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In The
SUPREME COURT OF THE UNITED STATES
October Term 1975

NO. 75-1876

IN THE MATTER OF: SAMUELS & CO., INC.,
Bankrupt

CURTIS R. STOWERS, ET AL.,

Petitioners

v.

JAMES S. MAHON, Trustee, and
C.I.T. CORPORATION,

Respondents

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Since there are no special or
important reasons for this Court's
granting review of this case, Respondents
pray that this Court deny Petitioners'
Petition for a Writ of Certiorari to the

United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

A former opinion of the Supreme Court reversing this case and remanding it to the Court of Appeals for the Fifth Circuit is reported at 416 U.S. 100 (1974). The opinion of the Fifth Circuit panel on remand is reported at 510 F.2d 139 (March 20, 1975) and is reproduced in the Appendix to the Petition. The opinion of the Fifth Circuit en banc, on rehearing, is reported at 526 F.2d 1238 (February 17, 1976) and is reproduced in the Appendix to the Petition.

JURISDICTION

The jurisdictional prerequisites are adequately set forth in the Petition.

QUESTION PRESENTED

Do the sellers of livestock who make delivery of the livestock to a buyer operating as a meat packer and receive in exchange checks which are later dishonored have any claims to such livestock and their proceeds which are superior to the claims to such livestock and their proceeds asserted by the buyer's trustee in bankruptcy and by a creditor of the buyer holding a perfected security interest in all of buyer's inventory and its proceeds?

STATUTES INVOLVED

Since Petitioners, in their Petition at pp. 46-56, did not set forth all pertinent statutes, the additional pertinent provisions of the Texas Uniform Commercial Code ("Code"), Tex.Bus. & Comm.C. §§ 1.201(19), 1.201(32), 1.201(33), 1.201(37),

1.201(44), 2.401, 2.403, 9.204, 9.301 and 9.312 and of the Bankruptcy Act, 11 U.S.C. §§ 107(c)(1)(B) and 110(c), are set forth in Appendix "A" hereto. The pertinent provisions of V.A.T.S. art. 6910b are also set forth in Appendix "A" hereto.

STATEMENT OF THE CASE

The pertinent facts are stated by this Court in its earlier opinion in this case at 416 U.S. 102-105.

ARGUMENT

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Rule 19, Supreme Court Rules. Respondents respectfully submit that since there are no special or important reasons why this Court

should hear this case again, this Court should deny Petitioners' Petition for a Writ of Certiorari.

I.

THE FEBRUARY 17, 1976, DECISION
BY THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT IS CORRECT.

In its February 17, 1976, decision, the Fifth Circuit, en banc, analyzed the clear provisions of the Code and the Bankruptcy Act. Applying such provisions to the dispute before it among (i) Respondent C.I.T. Corporation ("C.I.T.") which held a perfected security interest in the inventory and inventory proceeds of Samuels & Co., Inc. ("Bankrupt"), the bankrupt meat packer, (ii) Petitioners, the unpaid sellers of cattle delivered to Bankrupt, and (iii) the trustee in bankruptcy ("Trustee"), the Fifth Circuit correctly held:

1. Bankrupt, which took delivery of cattle and thereafter gave in exchange checks which were later dishonored, had the power to transfer good title to such cattle and its proceeds to a good faith purchaser for value. Code § 2.403(a). C.I.T. was such a good faith purchaser for value of the cattle and proceeds in question from Bankrupt. Code §§ 1.201(19), 1.201(32), 1.201(33), 1.201(44). C.I.T.'s rights to the cattle and proceeds were therefore superior to those of Petitioners, the unpaid sellers. Code § 2.403(a).

2. By delaying a year in seeking reclamation, Petitioners lost whatever rights (if any) they may have had to reclaim the cattle or its proceeds. Code §§ 2.702, 2.507.

3. Petitioners, who attempted to retain title to cattle they sold and delivered to Bankrupt, by law retained

security interests in such goods. Code § 2.401(a). C.I.T. held a perfected security interest in Bankrupt's inventory and inventory proceeds, and such security interest attached to the particular goods in question and their proceeds. Code §§ 9.204. C.I.T.'s perfected security interest in Bankrupt's inventory and inventory proceeds took priority over Petitioners' unperfected security interests in the cattle they sold and delivered to Bankrupt. Code § 9.301(a).

4. Under the Bankruptcy Act, Trustee held a claim prior to those asserted by Petitioners as holders of unperfected security interests in the cattle and proceeds in question. 11 U.S.C. §§ 107(c)(1)(B) and 110(c).

In its holding, the Fifth Circuit en banc followed the clear provisions of the Code and the Bankruptcy Act. Peti-

tioners, however, now appear to contend that (i) the Fifth Circuit, in so following the clear mandates of the Code and the Bankruptcy Act, ignored equitable principles inherent in all bankruptcy proceedings, in the Code and in the Packers and Stockyards Act, (ii) a course of conduct required by the Packers and Stockyards Act altered "a strict and purely technical and legalistic view of the U.C.C." (Petition at 12), and (iii) the Fifth Circuit erred in observing, at 526 F.2d 1241 (f.n. 3), that "...the Supreme Court in its opinion referred to ...[C.I.T. and the Trustee] as...[good faith purchasers for value]."

A. Equitable Principles Do Not Alter the Correctness of the February 17, 1976, Decision by the Fifth Circuit.

Because the Fifth Circuit found Petitioners' claims to be wanting,

Petitioners now claim that the court ignored principles of equity which operated to give them priority. Why Petitioners, who slept upon their rights, are entitled to special equitable consideration is not clear. As Judge Godbold aptly observed at 526 F.2d 1247-48,

Any seeming unfairness to Stowers [Petitioners] resulting from the Code's operation is illusory, for the sellers could have protected their interests, even as against C.I.T.'s prior perfected interest, if they had merely complied with the U.C.C.'s purchase-money provisions.

What is clear is that, "[e]quity will not assist a man whose condition is attributable only to that want of diligence which may be fairly expected from a reasonable person." Upton v. Tribilcock, 91 U.S. 45, 23 L.Ed. 203, 207 (1875).

Even if Petitioners were entitled to special equitable consideration, equity could not change the correctness of the February 17, 1976, decision of the Fifth Circuit since the decision is based on clear statutory provisions. As this Court stated in Magniac v. Thomson, 56 U.S. (15 How.) 281, 14 L.Ed 696, 703-4 (1853),

...[T]here may be propounded as postulates or legal truisms, admitting of no dispute, the following propositions:

1. That wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim: equitas sequitur legem is strictly applicable. ...

B. No Course of Conduct or Trade Usage Alters the Conclusion Required by Statute that C.I.T. and the Trustee have Prior Claims to the Cattle and Their Proceeds as Against Petitioners.

The apparent assertion by Petitioners that a course of conduct mandated by the

Packers and Stockyards Act alters the priorities firmly established by the Code and the Bankruptcy Act arises out of a comment by this Court in its former opinion in this case at 416 U.S. 113-114 that,

While we hold that the Act and regulations do not ex proprio vigore override the provisions of Texas law determining priorities to the funds in question, we do not mean to say that a course of conduct mandated by the Act or regulations might not, just as any other course of conduct, be relevant or even dispositive under state law. The District Judge, herself a long-time Texas practitioner and then state court judge before taking the federal bench, determined otherwise here.

Petitioners place great reliance on section 1.102(c) of the Code which states in part, "The effect of provisions of this title may be varied by agreement...." They contend that by an implied agreement and course of conduct they were not

creditors of the Bankrupt but instead owners of the cattle which had been sold and delivered to the Bankrupt.

Certainly freedom of contract is a principle of the Code. However, one important (and necessary) limitation on this freedom of the parties to vary agreement the effect of the Code on commercial transactions is obvious: the parties to an agreement cannot thereby alter or affect the rights of third parties. As noted in the Official Comment to Section 1.102,

...the effect of an agreement on the rights of third parties is left to specific provisions of this Act....The rights of third parties under Section 9.301 when a security interest is unperfected, for example, cannot be destroyed by a clause in the security agreement.

See Herington Livestock Auction Co. v. Verschoor, 179 N.W.2d 491 (Iowa 1970); First National Bank v. Smoker, 153 Ind.

App. 71, 286 N.E.2d 203, pet. for reh'g denied, 153 Ind.App. 71, 287 N.E.2d (1972).

Thus, as to third parties such as C.I.T. the relationship between Bankrupt and each Petitioner was that of debtor and secured party. No course of conduct between Bankrupt and each Petitioner changed this important basic fact.

In a recent and similar case before the Court of Appeals for the Tenth Circuit, U.S. v. Wyoming National Bank, 505 F.2d 1064 (1974), the court, dismissing the cattle seller's arguments to the effect that the Packers and Stockyards Act altered the Code, cited this Court's observation in this case that a course of conduct mandated by the Packers and Stockyards Act "may be relevant or even dispositive under state law." But the Tenth Circuit concluded, at 505 F.2d 1067, that, "[i]n the case at bar we find

nothing in the [Packers and Stockyards] Act, or in the mentioned regulations, which is relevant to or dispositive of state law issues."

C. The Fifth Circuit's Holding that C.I.T. was a Good Faith Purchaser for Value is Correct.

As noted above, the dissenting opinion of Circuit Judge Godbold at 510 F.2d 139 was adopted by the Fifth Circuit as its opinion on rehearing en banc at 526 F.2d 1238. To this opinion the Fifth Circuit en banc added the following comment which appears as part of footnote 3 at 526 F.2d 1241:

Also we note a matter not mentioned in the dissenting opinion of Judge Godbold. The District Court, which accepted the Referee's findings of fact but rejected his conclusions of law, held that C.I.T. and the trustee in Bankruptcy were good faith purchasers for value, and the Supreme Court in its opinion referred to them as such.

Petitioners contend that this statement is tantamount to a statement that the Supreme Court held that C.I.T. and the Trustee were good faith purchasers for value and is therefore incorrect.

In its opinion the Supreme Court stated, at 416 U.S. 104,

The District Court accepted the referee's findings of fact but reversed on the law. Turning to the provisions of the Texas Business and Commercial Code, which are largely counterparts of the Uniform Commercial Code, the court found that the respondents by their delivery of the cattle had retained only a security interest in those animals and the proceeds therefrom. It further found that the respondents had taken no action to perfect their security interest nor attempted to utilize any right of reclamation they might have had under Texas law. Delivery of the cattle to Samuels on this basis enabled it to transfer good title to a good-faith purchaser for value, a category of persons which included both C.I.T. and the trustee in bankruptcy.

In asserting that the above statement by the Fifth Circuit en banc is an incorrect assessment of the Supreme Court's holding and is a sufficient ground for the granting of a writ of certiorari, Petitioners have overlooked two facts:

1. In the above quoted footnote the Fifth Circuit panel simply stated that the district court held that C.I.T. and the Trustee were good faith purchasers for value (which it did) and that the Supreme Court referred to them as such (which it did).

2. In any event, Circuit Judge Godbold in his dissenting opinion adopted by the Fifth Circuit en banc as its opinion thoroughly analyzed the facts and the law and concluded that C.I.T. was a good faith purchaser for value, as the district judge had concluded.

It is evident that the Fifth Circuit en banc did not misconstrue any statement by the Supreme Court in its earlier decision in this case. Assuming, however, for the purposes of argument that it did, the Fifth Circuit's conclusion that C.I.T. was a good faith purchaser for value is nonetheless accurate. Thus, Petitioners' claims that the Fifth Circuit misconstrued a comment by the Supreme Court in its earlier opinion in this case do not raise special or important reasons for this Court's granting this Petition.

II.

THERE IS NO CONFLICT OF DECISIONS.

The February 17, 1976, decision by the Fifth Circuit sitting en banc is in accord with other state and federal court decisions involving some or all of the same or similar issues. See

U.S. v. Wyoming National Bank, supra;
Evans Products Co. v. Jorgensen, 245 Ore.
362, 421 P.2d 978 (1966); Herington Live-
stock Auction Co. v. Verschoor, supra;
First National Bank v. Smoker, supra;
Guy Martin Buick, Inc. v. Colorado
Springs National Bank, 184 Colo. 166, 519
P.2d 354 (1974); In the Matter of J. Bain,
Inc., CCH Secured Transactions Guide
¶52,686 (S.D. Fla. 1975). In their
 Petition Petitioners did not indicate
 that this decision conflicts with other
 federal court decisions. In fact, no
 such conflict exists.

III.

THIS CASE PRESENTS NO IMPORTANT
 QUESTION OF STATE OR FEDERAL LAW
 MERITING CONSIDERATION BY THIS COURT.

The only significant federal ques-
 tion in this case was decided by this
 Court in its earlier opinion. Petition-

ers have attempted to create questions
 of federal law by arguing that equitable
 principles inherent in the Bankruptcy
 Act operate to amend clear state statu-
 tory provisions and that a course of con-
 duct prescribed by the Packers and Stock-
 yards Act also operates to amend clear
 state statutory provisions. These con-
 tentions, however, are untenable and
 hence do not raise important questions
 of law.

IV.

A NEW TEXAS STATUTE DECREASES ANY
 SIGNIFICANCE THIS CASE MAY HAVE.


In 1975 the Texas Legislature en-
 acted a new law, V.A.T.S. art. 6910b
 (1975-1976 Supp.), which gives one sell-
 ing livestock subsequent to the statute's
 date of effectiveness (September 1, 1975)
 a lien on cattle sold and its pro-
 ceeds. This lien has priority over all

security interests in the livestock and its proceeds created by the purchaser. The existence of this new statutory provision illustrates two points: (i) any significance which this case may have had has been diminished; and (ii) the legislatures and not the courts have the power to effect changes in parties' clear statutory rights and remedies--such as the changes requested by Petitioners herein.

CONCLUSION

For the foregoing reasons Respondents respectfully urge that Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,


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APPENDIX "A"

STATUTORY PROVISIONS

TEXAS BUSINESS AND COMMERCE CODE

§ 1.201. General Definitions

....

(19) "Good Faith" means honesty in fact in the conduct or transaction concerned.

....

(32) "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift or any other voluntary transaction creating an interest in property.

(33) "Purchaser" means a person who takes by purchase.

....

(37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reserva-

tion of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2.401) is limited in effect to a reservation of a "security interest". The term also includes any interest of a buyer of accounts, chattel paper, or contract rights which is subject to Chapter 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under Section 2.401 is not a "security interest", but a buyer may also acquire a "security interest" by complying with Chapter 9....

....

(44) "Value". Except as otherwise provided with respect to negotiable instruments and bank collections (Sections 3.303, 4.208 and 4.209) a person gives "value" for rights if he acquires them

(A) in return for a binding

commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; or

- (B) as security for or in total or partial satisfaction of a pre-existing claim; or
- (C) by accepting delivery pursuant to a pre-existing contract for purchase; or
- (D) generally, in return for any consideration sufficient to support a simple contract.

§ 2.401. Passing of Title; Reservation for Security; Limited Application of This Section.

Each provision of this chapter with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this chapter and matters concerning title become material the following rules apply:

(a) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2.501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this title. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer

is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the chapter on Secured Transactions (Chapter 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(b) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading

(1) if the contract requires
or authorizes the seller

- to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but
- (2) if the contract requires delivery at destination, title passes on tender there.

....

§2.403. Power to Transfer; Good Faith Purchase of Goods; "Entrusting"

(a) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of

purchase the purchaser has such power even though

- (1) the transferor was deceived as to the identity of the purchaser, or
- (2) the delivery was in exchange for a check which is later dishonored, or
- (3) it was agreed that the transaction was to be a "cash sale", or
- (4) the delivery was procured through fraud punishable as larcenous under the criminal law.

....

§ 9.204. When Security Interest Attaches; After-Acquired Property; Future Advances

(a) A security interest cannot attach until there is agreement (Subdivision (3) of Section 1.201) that it

attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching.

....

(c) Except as provided in Subsection

(d) a security agreement may provide that collateral, whenever acquired, shall secure all obligations covered by the security agreement.

....

(e) Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment.

§ 9.301. Persons Who Take Priority Over Unperfected Security Interests; "Lien Creditor"

(a) Except as otherwise provided in Subsection (b), an unperfected security

interest is subordinate to the rights of

- (1) persons entitled to priority under Section 9.312;
- (2) a person who becomes a lien creditor without knowledge of the security interests and before it is perfected;

....

(b) If the secured party files with respect to a purchase money security interest before or within ten days after the collateral comes into possession of the debtor, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing.

(c) A "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy or

the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment. Unless all the creditors represented had knowledge of the security interests such a representative of creditors is a lien creditor without knowledge even though he personally has knowledge of the security interest.

§ 9.312. Priorities Among Conflicting Security Interests in the Same Collateral

....

(e) In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in Subsections (c) and (d) of this section),

priority between conflicting security interests in the same collateral shall be determined as follows:

- (1) in the order of filing if both are perfected by filing, regardless of which security interest attached first under Section 9.204 (a) and whether it attached before or after filing;
- (2) in the order of perfection unless both are perfected by filing, regardless of which security interest attached first under Section 9.204(a) and, in the case of a filed security interest whether it attached before or after filing; and
- (3) in the order of attachment

under Section 9.204(a) so long as neither is perfected.

Bankruptcy Act, 11 U.S.C.

§ 107. Liens and fraudulent transfers

....

(c)(1) The following liens shall be invalid against the trustee:

....

(B) every statutory lien which is not perfected or enforceable at the date of bankruptcy against one acquiring the rights of a bona fide purchaser from the debtor on that date, whether or not such purchaser exists: Provided, That where a statutory lien is not invalid at the date of bankruptcy against the trustee

under subdivision (c) of section 110 of this title and is required by applicable lien law to be perfected in order to be valid against a subsequent bona fide purchaser, such a lien may nevertheless be valid under this subdivision if perfected within the time permitted by and in accordance with the requirements of such law: And provided further, That if applicable lien law requires a lien valid against the trustee under section 110(c) of this title to be perfected by the seizure of property, it shall instead be perfected as permitted by this subdivision by filing notice thereof

with this court;

....

§ 110. Title to property

....

(c) The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee shall have as of the date of bankruptcy the rights and powers of: (1) a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or not such a creditor exists, (2) a creditor who upon the date of bankruptcy obtained an execution returned unsatisfied against the bankrupt, whether or not such a creditor exists, and (3) a

creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings upon all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists. If a transfer is valid in part against creditors whose rights and powers are conferred upon the trustee under this subdivision, it shall be valid to a like extent against the trustee. In cases where repugnancy or inconsistency exists with reference to the rights and powers in this subdivision conferred, the trustee may elect which rights and powers to exercise with reference to a particular party, a particular remedy, or a particular transaction, without prejudice to his right to maintain a different position with

reference to a different party; a different remedy, or a different transaction.

....

V.A.T.S. art. 6910b. Payment for Live-
stock Purchased for
Slaughter

Section 1. As used in this Act, unless the context clearly requires otherwise, the following words and phrases shall have the meaning ascribed to them in this section:

(a) "Livestock" means cattle, sheep, goats, or hogs.

(b) "Meat Processor" means a person, corporation, association, or other legal entity engaged in the business of slaughtering cattle, sheep, goats, or hogs, and processing or packaging them for sale as meat.

....

Section 4. Any person, partnership, firm, corporation, or other organization who

sells livestock for slaughter shall have a lien on such animal, its carcass, all products therefrom, and proceeds thereof to secure all or a part of its sales price.

....

Section 5. The lien provided herein shall be deemed to have attached and to be perfected upon delivery of the livestock to the purchaser without further action, and such lien shall continue in the livestock, its carcass, all products therefrom, and proceeds thereof without regard to possession thereof by the party entitled to such lien without further perfection.

Section 6. If the livestock or its carcass or products therefrom are so commingled with other livestock, carcasses, or products therefrom so that the identity thereof is lost, then the lien herein granted shall extend to the

same effect as if same had been perfected originally in all such animals, carcasses, and products with which it has become commingled; provided, however, that all liens so extended under this section to such commingled livestock, carcasses, and products shall be on a parity with one another, and provided further that with respect to such commingled carcasses or products upon which a lien or liens have been so extended under this section, no such lien shall be enforceable as against any purchaser without actual knowledge thereof purchasing one or more of such carcasses or products in the ordinary course of trade or business from the party having commingled such carcasses or products, nor against any subsequent transferee from such purchaser, but in the event of such sale, such lien shall instead extend to the proceeds of such sale.

Section 7. The lien provided for in this article shall have priority over any other lien or perfected security interest in the livestock, its carcass, all products therefrom, and proceeds thereof not granted hereunder.